



Gavin Newsom
Mayor

Mitchell H. Katz, MD
Director of Health

MEMORANDUM
PRIVILEGED & CONFIDENTIAL

DATE: September 22, 2008

TO: Commissioners, and Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

FROM: Mitch Katz, Director
Director of Health *Mitchell Katz*

RE: Comment on "Sponsorship Identification Rules and Embedded Advertising"
MB Docket No. 08-90, FCC 08-155

I. SUMMARY

As a Director of Public Health representing the interests of hundreds of thousands of San Franciscans, I write the Federal Communications Commission to encourage you to proceed with the rule changes you have proposed regarding embedded advertising.

Technological and social changes have necessarily prompted advertisers to explore new methods of persuading consumers. In particular, digital video recorders ("DVRs") that enable television watchers to skip traditional commercials have made product placement more attractive as a marketing tool. But changing circumstances have not altered a principle long-recognized and protected by the FCC: people need to know when, and by whom, they are being advertised to.

Effective sponsorship identification ensures that consumers can make informed and responsible purchasing decisions. Identification maintains fair play in the advertising marketplace by protecting individuals from deception but not preventing them from learning about desirable or useful products. It allows marketers to inform consumers without misleading them.

Sponsorship identification becomes much more important when certain kinds of product placements are considered. Specifically, embedded advertisements for prescription drugs pose specific risks that will be partially addressed by the rule changes the FCC proposes. These risks deserve a public discussion and might prompt other regulatory agencies to

MEMORANDUM

RE: Comment on "Sponsorship Identification Rules and Embedded Advertising"
MB Docket No. 08-90, FCC 08-155

DATE: September 22, 2008

PAGE: 2

consider their own rule changes, but the FCC's proposals regarding sponsorship identification are a judicious first step.

Embedded advertisements of prescription pharmaceuticals pose a risk to consumers beyond that posed by other product placements because consumers are not well equipped to assess the claims made about prescription drugs. Although little research specifically addresses the effectiveness of embedded pharmaceutical advertisements, direct to consumer ("DTC") advertising of pharmaceuticals has been quite effective in promoting consumer demand, thereby increasing the costs of medical care. Further, prescription drug product placements do not provide consumers adequate information about drug side effects, therapeutic alternatives, efficacy, and costs.

Currently, pharmaceutical product placement is largely unregulated. The Food and Drug Administration has substantive authority over drug advertisements, but as of yet has not addressed the increasing use of embedded advertising by pharmaceuticals. The FCC's proposed rule changes are therefore an important way of addressing some of the risk that prescription drug product placements pose, and of drawing attention to the issue for future consideration by other entities.

II. GROWING USE OF EMBEDDED ADVERTISEMENTS FOR PRESCRIPTION PHARMACEUTICALS.

Pharmaceutical companies have been permitted to advertise prescription drugs directly to consumers since 1985. Research suggests that such advertising is exceptionally effective¹ in encouraging consumers to inquire about particular drugs to their health care providers. In 2003, the pharmaceutical industry spent \$25.3 billion on promotion.² Of that, the majority (85%) was devoted to physician-oriented marketing, but especially since the FDA altered its regulations in 1997 and 1999, DTC marketing is on the rise: "in the first half of 2005, only automobile advertising as a product group spent more in media campaigns than pharmaceuticals."³ Pharma's DTC marketing is effective: "each dollar spent on DTC advertising in 2000 yielded \$4.20 in additional pharmaceutical sales in that year."⁴ Television advertising constitutes a growing percentage of the resources pharmaceutical companies spend on drug advertising. More specifically, recent articles

¹ See Michie Hunt, "Direct to Consumer Advertising of Prescription Drugs," National Health Policy Forum, April 1998.

² Sony Ta and Dominick L. Frosch, Pharmaceutical Product Placement: Simply Script or Prescription for Trouble?, J. PUB. POL. & MARKETING, Spring 2008 at 1.

³ *Id.*

⁴ *Id.* at 1-2 (quoting a Kaiser Family Foundation 2003 report).

MEMORANDUM

RE: Comment on "Sponsorship Identification Rules and Embedded Advertising"
MB Docket No. 08-90, FCC 08-155

DATE: September 22, 2008

PAGE: 3

have noted that pharmaceutical manufacturers, like others, are turning to product placement.⁵

Product placement "is the practice of inserting 'branded products into programming in exchange for fees or other consideration.'"⁶ The purpose of such embedded advertising "is to draw on a program's credibility in order to promote a commercial product by weaving the product into the program."⁷ With the increased popularity of DVRs that enable consumers to skip traditional commercials, product placement is on the rise: a media research firm estimates that "between 1999 and 2004, the amount of money spent on television product placement increased an average of 21.5 percent per year."⁸ The jump between 2004 and 2005 was even higher—48.7 percent—bringing the total value of the U.S. paid product placement market to \$1.50 billion.⁹

Product placement serves as effective advertising that sidesteps the requirements applicable to more traditional commercials. In the context of advertising pharmaceuticals, product placement is an effective practice on the growing number of medical themed television programs. A *Fortune* article dated September 28, 2007, describes this new practice and states that Vicodin, Cialis, Ambien, and Cipro have figured in the plotlines of primetime television series.¹⁰ Medical shows such as "Scrubs", "House" and "Grey's Anatomy" mentioned or displayed logos for pharma products in the previous year. Organon Pharmaceuticals is one of the few companies that admits to brokering product placement deals, and that the company's "NuvaRing" has been seen or talked about on several primetime TV series.¹¹ Similarly, a *Brandweek* article noted that the Epi-Pen, an injectible drug to combat allergic reactions, was repeatedly mentioned and specifically described in an episode of *Boston Legal*, and was also mentioned five times on an episode of "ER."¹²

⁵ See, e.g., John Simons, *Big Pharma's Ready for Prime Time*, FORTUNE, September 27, 2007, available at http://money.cnn.com/2007/09/28/magazines/fortune/simons_productplacement.fortune/?postversion=20070928 10.

⁶ *In re Sponsorship Identification Rules and Embedded Advertising*, Notice of Inquiry and Notice of Proposed Rule Making, FEDERAL COMMUNICATIONS COMMISSION, MB DOCKET NO. 08-90, FCC 08-155, at 1 (2008) [hereinafter *FCC*]. The Writers Guild distinguishes between product placement and product integration: "[p]roduct placement is the placement of commercial products as props in television programming, whereas product integration integrates the product into the dialogue and/or plot of a program." *Id.* This memo will refer to both practices as "product placement."

⁷ *Id.* at 1-2.

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ See John Simons, *Big Pharma's Ready for Prime Time*, FORTUNE, September 27, 2007, available at http://money.cnn.com/2007/09/28/magazines/fortune/simons_productplacement.fortune/?postversion=20070928 10.

¹¹ *Id.*

¹² See Jim Edwards, *This Your Show on Drugs: Rx Brands Injected into Action*, BRANDWEEK, March 12, 2007, available at http://www.brandweek.com/bw/magazine/columns/article_display.jsp?vnu_content_id=1003556675.

MEMORANDUM

RE: Comment on "Sponsorship Identification Rules and Embedded Advertising"
MB Docket No. 08-90, FCC 08-155

DATE: September 22, 2008

PAGE: 4

A posting to the *Wall Street Journal's* health blog provides circumstantial evidence that these advertisements are effective. On May 20, 2008, the blog reported that after the flu and Parkinson's drug amantadine featured in an episode of the medical drama *House*, it rose to the top of Google's "Hot Trends" list of most frequently searched terms.¹³ The *Journal* also reported that, "between January and September [of 2007], pharmaceutical products and logos were seen or mentioned 705 times on broadcast and cable television, up from 630 times during the same period in '06."¹⁴

The potential harm from prescription drug product placement is fourfold. First, where consumers are unaware that they are being advertised to they may be less able to judge the value of a particular product. Second, in the specific context of prescription drugs, product placement is more dangerous. Two features distinguish drugs from other products, and make their promotion by embedded advertising particularly problematic: first, it is difficult for consumers to gauge a drug's utility, and second, consumers lack the clinical knowledge to appreciate drugs' risks and side effects. Judging the efficacy and appropriateness of prescription drugs requires a specialized medical knowledge that is beyond most consumers. Third, there is also evidence that advertising pharmaceuticals tends to increase the frequency at which they are prescribed. Consumers who request a particular brand of drug are more likely to leave their doctor's office with some type of prescription. This may lead to over or unnecessary prescriptions, and add to the growing cost of healthcare. Finally, when prescription drugs are advertised in medicine-themed shows by trusted on-screen doctors, consumers may be more likely to understand endorsements as credible and worth acting on.

III. SPONSORSHIP IDENTIFICATION AS A PARTIAL MEANS TO PROTECT CONSUMERS AGAINST THE RISKS POSED BY PRESCRIPTION DRUG PRODUCT PLACEMENTS.

The FCC's proposed rules requiring the identification of advertisers will be a helpful first step in mitigating the effects of product placement of prescription pharmaceuticals. Consumers need to know when, and by whom, they are being advertised to. In the context of prescription drug product placements, effective sponsorship identification reduces the risk that consumers will make poorly-informed choices regarding medical treatment merely because a trusted doctor character on a favorite TV show may recommend it. Sponsorship identification of prescription drug product placements may alert consumers and policymakers alike to this growing practice, and prompt a more involved public discussion about it. Accordingly, this office supports the FCC's proposed rulemaking and encourages the FCC to implement the proposed changes.

¹³ See Jacob Goldstein, 'House' Episode Sparks Google Frenzy for Flu Drug, WALL STREET JOURNAL HEALTH BLOG, May 20, 2008, available at <http://blogs.wsj.com/health/2008/05/20/house-episode-sparks-google-frenzy-for-flu-drug/>.

¹⁴ *Id.*